

DECISION



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THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

P.L. -1
TANNICELLI

FILE: B-201681

DATE: July 7, 1981

MATTER OF: Diversified Computer Services, Inc.

DIGEST:

1. GAO does not conduct investigation to establish validity of protester's allegation since protester has burden to affirmatively prove its case.
2. Protest against award on basis that low bid is unbalanced is denied. Even assuming low bid is mathematically unbalanced, we cannot conclude that low bid is materially unbalanced since labor-hour estimates stated in IFB were reasonably computed, protester has presented no evidence to cast doubt upon accuracy of IFB estimates, and low bid was significantly lower than all other bids and will apparently result in lowest overall cost to Government.
3. Protest issues alleging deficiencies in solicitation which should have been apparent from solicitation itself are untimely where filed after bid opening.
4. In view of conclusion that award is otherwise proper, we will not consider procedural matter of propriety of awarding while protest was pending since, even if award was contrary to applicable regulations, its legality would not be affected.

Diversified Computer Services, Inc. (Diversified), has protested against the award of a requirements contract for providing technical expertise and services to Scientific Management Corporation (SMC) pursuant to invitation for bids No. DACA78-81-B-0013 for the Automatic Data Processing Center, Rear Echelon, Middle East Division of the Army Corps of Engineers. Diversified's basic contention is that the bid submitted by SMC is unbalanced.

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We believe the protest to be without merit.

The IFB listed 12 labor categories and gave an estimate of the number of labor hours in each category which the Corps of Engineers expected to order from the contractor during the contract period. The IFB cautioned that these figures were merely estimates of requirements in excess of the quantities which the Rear Echelon would be able to perform in-house. Based upon the estimated requirements, bidders were to bid a fixed-price per labor hour per category as well as a total price per category by multiplying the per-hour rate times the estimated number of hours needed per category. By adding the totals per category, a fixed price for the entire requirement was computed and this figure was used to determine the lowest bid price for award purposes. In accord with the IFB, award was to be made, after technical evaluation to determine which bidders were qualified to perform the services, to the lowest responsive, responsible bidder.

Diversified alleges that SMC's bid is unbalanced, but has offered no evidence in support of its allegation other than a statement that the labor rates bid by SMC are not commensurate with the level of experience required for each category. Instead, Diversified requests that our Office audit the first two task orders placed under the SMC contract to determine whether SMC's bid really is unbalanced.

At the outset, we point out that the protester bears the burden of affirmatively proving its case. Kessel Kitchen Equipment Co., Inc., B-190089, March 2, 1978, 78-1 CPD 162. Furthermore, it is not our practice, pursuant to our bid protest function, to conduct investigations to establish the validity of a protester's allegations. Fire & Technical Equipment Corp., B-191766, June 6, 1978, 78-1 CPD 415. Therefore, we are denying Diversified's request that we audit the first two task orders issued to SMC under this contract.

As to the matter of unbalanced bids, generally, it is our view that it is in the best interest of the Government to discourage, through appropriate invitation

safeguards, the submission of unbalanced bids based on speculation as to which items are purchased in greater quantities. However, the fact that a bid may be unbalanced does not render it nonresponsive nor does such factor of itself invalidate an award of a contract to such bidder. Oswald Brothers Enterprises, Incorporated, B-180676, May 9, 1974, 74-1 CPD 238. We also recognize that there are two aspects to unbalanced bidding. The first is a mathematical evaluation of the bid to determine whether each bid item carries its share of the cost of the work plus profit, or whether the bid is based on nominal prices for some work and enhanced prices for other work. The second aspect--material unbalancing--involves an assessment of the cost impact of a mathematically unbalanced bid. A bid is not materially unbalanced unless there is a reasonable doubt that award to the bidder submitting a mathematically unbalanced bid will not result in the lowest ultimate cost to the Government. Consequently, only a bid found to be materially unbalanced may not be accepted. See Kollmorgen Corporation, B-201254, February 3, 1981, 81-1 CPD 63.

Even if we assume that SMC's bid is mathematically unbalanced, we do not find the bid to be materially unbalanced. Diversified has furnished nothing to show that the actual number of labor hours required in any category will be so much higher than the estimated quantity that the contract with SMC will not result in the lowest overall cost to the Government. The estimates stated in the IFB were computed by extrapolating from the last eight work orders issued under the predecessor contract. This information was supplied to the contracting officer by the Chief of the Automated Data Processing Center. It appears that the contracting officer incorporated eight of these estimates verbatim into the IFB. In the other four labor categories, where the work orders showed no usage at all, the contracting officer increased the IFB estimate to 50 hours per category. We cannot find the contracting officer's reliance on the Automatic Data Processing Center work order information or his methodology for determining the IFB estimates to be unreasonable and the protester has

presented no evidence to cast doubt upon the accuracy of those estimates. See, for example, ACMAT Corporation, B-197589, March 18, 1981, 81-1 CPD 206.

Furthermore, we note that SMC's total bid price of \$108,713 was significantly lower than the next low bid price of \$190,629, or the protester's bid price of \$200,915. In these circumstances, we cannot conclude that SMC's bid was materially unbalanced since it appears that SMC's bid will result in the lowest overall cost to the Government. Therefore, this protest issue is denied.

Diversified has also charged that: (1) under the terms of the solicitation, each task order will be separately negotiated and may result in an actual price which is higher than SMC's bid price and (2) the solicitation should have followed the General Services Administration's practice of establishing a unit price for each item and have bidders bid a single discount figure for the procurement. These alleged deficiencies were apparent from the solicitation itself (the negotiation of task orders and the manner in which bids would be evaluated) and, therefore, had to be protested prior to the December 23, 1980, bid opening date in order to be considered on their merits under section 20.2(b)(1) of our Bid Protest Procedures. 4 C.F.R. part 20 (1980). Since the protest was first filed in our Office on January 5, 1981, these issues are dismissed as untimely. We wish to point out, however, that the hourly rate of the contractor's personnel is not negotiated, but only the number of hours and type of personnel necessary to perform the task order.

In its comments on the agency's report on this protest, Diversified raised three new issues: (1) the SMC contract will actually cost more than the \$108,713 bid because the contract allows payment of \$35 per diem; (2) the three technically highest rated bidders used resumes of the same individuals; and (3) certain rates do not conform to the wage determination of the Department of Labor under the Service Contract Act.

The first of these issues is untimely under section 20.2(b)(1) of our Bid Protest Procedures because it was specifically stated in the IFB that travel costs would be reimbursed in accord with the Joint Travel Regulations. Accordingly, this issue was apparent from the solicitation and should have been filed before bid opening. Furthermore, since any contractor awarded this contract would be entitled to travel costs, we cannot see how Diversified was prejudiced by this provision as each bidder's price would be similarly affected. Regarding the second issue, we cannot see that Diversified has been prejudiced in any way, even if several bidders planned on using the same personnel, in view of the fact that award was made to the lowest responsive, responsible bidder in accord with the provisions of the IFB. See Cummings Marine Systems, Inc., B-197506, August 21, 1980, 80-2 CPD 136.


Concerning the allegation that SMC's bid may reflect wage rates below the minimum wage levels required under the Service Contract Act, it is not a matter which we will consider under our bid protest function since enforcement of that act rests with the Department of Labor. See Forte, Inc., B-203041, May 19, 1981, 81-1 CPD 388.

Diversified has also protested against the award to SMC by the Corps of Engineers after the filing of its protest.

In view of our conclusion that the SMC bid was not unbalanced and that the award was otherwise proper, whether it was proper to make award to SMC while the protest was pending is academic. See Starline, Incorporated, 55 Comp. Gen. 1160, 1172 (1976), 76-1 CPD 365. While our Procedures provide in section 20.3(a) that we will notify the contracting agency within 1 day after a protest has been received, we admit that that procedure was inadvertently not followed here and the Corps made award 2 days after the protest was filed. However, this procedural impropriety is immaterial since the Corps states that it would have awarded to SMC even if timely notified by us. Moreover, even if the award was contrary to

applicable regulations, its legality would not be affected. See Aul Instruments, Inc., B-199416.2, January 19, 1981, 81-1 CPD 31. Therefore, this protest issue is denied.

Accordingly, there is no legal basis to question the award of the contract to SMC and the protest is therefore denied.

A handwritten signature in cursive script, reading "Milton J. Arosow".

Acting Comptroller General
of the United States -